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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

No. 793

LOUISIANA FINANCIAL ASSISTANCE COMMISSION: E. W. Gravolet, Jr., James R. Leake, James D. Fountain, and Lantz Womack, officers and members of the Louisiana Financial Assistance Commission, et al

Appellants

v.

BRYAN POINDEXTER, a minor, by LORRAINE POINDEXTER, his mother and next friend; ALFRED LOUIS LARKS, a minor, by CHARLES LARKS and CORA LEE LARKS, his parents and next friends; ANTHONY JARROW, a minor, by PETER JARROW and RUBY JARROW, his parents and next friends; on behalf of themselves and other Negro children and their parents similarly situated,

Appellees

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF LOUISIANA

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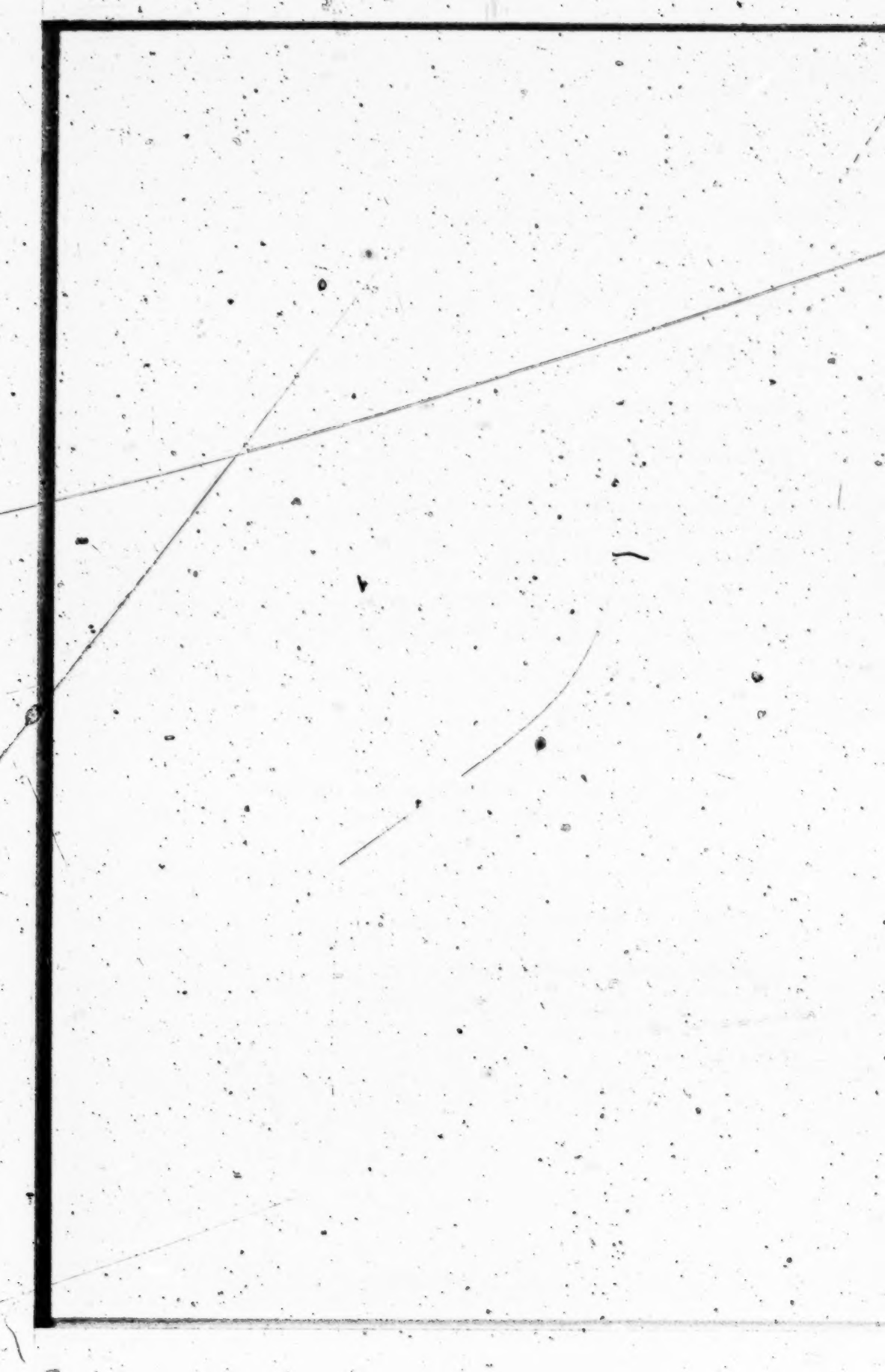

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STATEMENT AS TO JURISDICTION

The Appellants, pursuant to United States Supreme Court Rule 13 (2) and 15, file this statement to show the basis upon which the Supreme Court of the United States has jurisdiction on a direct appeal to review the final decree of permanent injunction in question and should exercise such jurisdiction in this case.

OPINIONS BELOW

The first opinion delivered in the lower Court was on a motion to dismiss the complaint for lack of standing on the part of all the plaintiffs. The citation to this opinion is Civil Action No. 14683, Docket of the Eastern District Court, 258 F.Supp. 158 (E.D., La., August 4, 1966). That opinion denied the motion to dismiss and, inter alia, stated it was not to form the basis for a motion for summary judgment. A copy thereof is in the appendix hereto.

The second opinion delivered in the lower Court was on the merits after a full trial. As it is yet unreported, it's only citation is Civil Action No. 14683, Docket of the Eastern District Court decided August 25, 1967 and entered August 26, 1967. That opinion enjoined the enforcement of Act 147 of the 1962 Session of the Louisiana Legislature. A copy thereof is in appendix hereto.

JURISDICTION

The several grounds upon which the jurisdiction of this Court is invoked are as follows:

(i) The proceedings below were in the nature of a complaint seeking an interlocutory and permanent injunction under Civil Rights Act of 1870, 42 U.S.C. 1981-1983 and under 28 U.S.C. 1343(3) restraining the enforcement, operation, or execution of an Act of the State of Louisiana, to wit, Act 147 of 1962 (R.S. 17:2951-2959) on the basis of its alleged repugnance to the equal protection clause of the Fourteenth Amendment to the Constitution of the United States.

(ii) The final decree appealed from was dated August 25, 1967 and entered on August 26, 1967. No rehearing was sought in the Court below. Notice of Appeal was filed in the

United States District Court for the Eastern District of Louisiana on September 8, 1967.

(iii) The Supreme Court of the United States has jurisdiction to review by direct appeal the judgment and decree complained of by provision 28 U.S.C. § 1253.

(iv) The following decisions are believed to sustain the jurisdiction of the Supreme Court to review the judgment on direct appeal in this case: *Florida Lime & Avocada Growers, Inc. v. Jacobsen,* 362 U.S. 73 and *U.S. v. Georgia Public Service Commission,* 371 U.S. 285.

(v) The validity of Act 147 of the Legislature of Louisiana for the year 1962 is involved. This act is found on pages 337 through 344 of the official acts of that year and in the Louisiana Revised Statutes under Title Seventeen as Sections 2951 through 2959. The full text of the act is set forth in the appendix hereto.

QUESTIONS PRESENTED

1) Whether the complaint should be dismissed for lack of standing of petitioners to question by action in the federal courts the use of state funds inasmuch as they allege no special interest in such funds.

2) Whether the Attorney General of the United States as intervenor had the right to challenge the constitutionality of Act 147 of the Louisiana Legislature for 1962 when the plaintiffs did not do so and their counsel stated in open Court that they deliberately chose not to do so, and did not amend their pleadings to do so despite the suggestion to that effect from the Court; and whether the Attorney General whose authority to intervene is derived from and limited by the Civil

Rights Act of 1964 may alter or enlarge the prayer of the complainants, or must take the issues as he finds them.

3) Whether in determining the constitutionality of legislation a Court may inquire into the motives of particular legislators.

4) Whether newspaper articles of current date containing alleged statements of legislators relative to legislation then under consideration are admissable as evidence to determine the constitutionality of the legislation.

5) Whether the provisions of the Civil Rights Act of 1964 relative to desegregation of schools represents a Congressional declaration of a uniform standard which the Courts should apply throughout the nation.

6) Whether the Court erred in its interpretation of the mandate in *Brown v. Board of Education of Topeka*, 347 U.S. 488.

7) Whether Act 147 of the 1962 Louisiana Legislature may be regarded as rendered unconstitutional by reason of prior acts of the Legislature, and finally, whether the act is unconstitutional.

Statement of the Case (Rule 15 1(d)

Act 147 of 1962 provides from funds not otherwise appropriated for education tuition grants for the parents of children eligible for public school education who choose to attend private non-sectarian schools. Nothing in the Act relates to race or color. Nothing in the policies of the Louisiana Financial Assistance Commission relates to race or color nor does race or color enter into the administration of the

Act, and the parents of Negro children and white children receive such grants. See appendix

The plaintiffs complain that their children were not admitted to private schools although children in attendance receive tuition grants from the Louisiana Financial Assistance Commission. They allege that they are Negroes and that their children are denied admission on that basis. They do not ask that such schools be declared to be public schools. They do not allege that public schools are closed; on the contrary the pleadings and the evidence show without dispute that the public schools are open. They do not ask that the private schools be required to receive Negro children. They do not ask in their complaint that Act 147 of 1962 be declared unconstitutional and their counsel stated in oral argument that their decision not to do so was deliberate and declined to amend their complaint in this respect when the Court suggested that they do so. Nevertheless, they ask that the defendants be enjoined from paying tuition grants to children attending such schools. They do not qualify this prayer by relating the question to the extent to which tuition paid by parents of children receiving grants contribute to the operating expenses of the school. They complain that it is illegal to permit any funds at all paid to parents as tuition grants to reach these private schools.

Nearly two years after the suit was filed, the United States Attorney General, purporting to act only under the Civil Rights Act of 1964, Sec. 902, 42 U.S.C. Sec. 2000 h-2, entered the suit as an intervenor and over the objection of the defendants amended the complaint to plead the unconstitutionality per se of Act 147 of 1962 irrespective of its administration.

Stipulations and undisputed evidence show that many

Negroes have received tuition grants; that no requests from Negroes have been denied; that no public schools have been closed; that the State of Louisiana, its Parishes and Municipalities spent $378,368,910.00 for the year 1965-66 year on the public schools, not counting capital investments; that the State tuition grants were $3,821,984.00, (about one per cent), drawn from appropriations separate from and without diminution of the appropriations made for public schools; that there were 793,173 children of both races in the public schools for the 1965-66 year; that there were only 14,564 children in the private non-sectarian schools (less than two per cent); and that neither the Commission nor its members exercise any control over the private schools.

The District Court did not find anything wrong with the provisions of Act 147, nor with its administration. Indeed the Court took pains to compliment Mr. James Fountain as Director of the Commission in his administration of the act. (See page ..... of the opinion in the Appendix hereto.) However, the District Court makes it clear in the third paragraph of its forty-four page opinion that it considers the Act unconstitutional on the basis of what it determined to be the motive for the Act.

Louisiana gives school books to children whether they attend public or private schools and in many cases lunches as well. Grave concern had been expressed as to whether nullification of tuition grants to children would also nullify grants of school books. The District Court said:

> "The free lunches and textbooks Louisiana provides for all its school children are the fruits of racially neutral benevolence. Tuition grants are not the products of such a policy. They are the fruits of the State's traditionally biased policy of providing segregated schools for white pupils. Here that policy has pushed the State to the extreme of using public funds

> to aid private discrimination endangering the public school system and equal educational opportunities for Negroes in Louisiana."

In the quoted statement the Court refers to "policy" rather than referring to "purpose" which may be considered in constitutional questions and rather than referring to "motive" which may not properly be considered. The thrust of the opinion shows that the Court was actually concerned by what it considered to be the motive of the legislators.

THE QUESTIONS PRESENTED ARE SO SUBSTANTIAL AS TO REQUIRE PLENARY CONSIDERATION RULE 15 1(f)

This case is of importance because the District Court has declared unconstitutional an Act which is valid on its face and the effect of which can be helpful to the state and nation, and has done so on the basis of statements attributed by newspapers to individual legislators and officials and by resort to history of discrimination against Negroes in the past. If such tests are allowed to stand, the Court will have departed from standards heretofore set for the determination of the constitutionality of statutes.

In the important field of validity or constitutionality, Cooley long ago declared:

> *"The validity of legislation can never be made to depend on the motives which have secured its adoption, whether these be public or personal, honest or corrupt.* There is ample reason for this in the fact that the people have set no authority over the legislators with jurisdiction to inquire into their conduct, and to judge what have been their purposes in the pretended discharge of the legislative trust. This is a jurisdiction which they have reserved to themselves

exclusively, and they have appointed frequent elections as the occasions and the means for bringing these agents to account. A further reason is, that *to make legislation depend upon motives would render all statute law uncertain, and the rule which should allow it could not logically stop short of permitting a similar inquiry into the motives of those who passed judgment.* Therefert the courts do not permit a question of improper legislative motives to be raised, but they will in every instance assume that the motives were public and befitting the station. They will also assume that the legislature had before it any evidence necessary to enable it to take the action it did take." Cooley, *Constitutional Law*, Chapter XV, p. 199. (*Italics here and hereinafter ours unless otherwise noted.*)

Education other than parental began with private schoolmasters and schools and has nearly always led the way in America often with public aid. Gabel, *Public Funds for Church and Private Schools.* Federal funds are similarly available without requiring the private schools which take students receiving aid to integrate the races. 38 U.S.C. 1601 (veterans); 38 U.S.C. 1701 (war orphans); and 20 U.S.C. 401 (needy students with demonstrated abilities).

The purpose of Act 147 of 1962 is declared thus:

". . . the Legislature of Louisiana, mindful of the need for literate and informed citizenry, and being desirous of advancing the cause of education generally, hereby declares that it is the policy of this state to encourage the education of all the children of Louisiana. In furtherance of this objective, and to afford each individual *freedom in choosing public or private schooling,* the Legislature finds that it is desirable and in the public interest that financial assistance should be provided from the public funds of the state for education of the children in private non-sectarian elementary or secondary schools in this State."

The purpose is lawful. Parents have the recognized constitutional right to send their children to private schools rather than to public schools. *Pierce v. Society of the Sisters*, 268 U.S. 510. It is not fair to say that only the wealthy may exercise that constitutional right, and it has never been considered an unlawful use of public money, either federal or state, to make tuition grants for educational purposes even though the recipient chooses to pay the tuition to a private school.

The State of Louisiana does not require the private schools to be conducted on a segregated basis. Such a requirement would be in violation of the decision of this Court in *Brown v. Board of Education of Topeka*, supra. The State of Louisiana does not forbid segregation in the private schools outright nor as a condition to granting aid to children attending such school. The *Brown* decision did not explicitly impose such a duty nor do we think it did so implicitly. The Civil Rights Act of 1964, as we understand it, and as the United States District Court for the Eastern District of Virginia understands it, imposes a limitation upon state aid and that Court held that the Constitution imposed a like limitation. *Griffin v. State Board*, 239 F. Supp. 560 (1965) but the same decision held the Virginia grant-in-aid statute to be constitutional per se.

The Louisiana Financial Assistance Commission has accepted the rule of the Civil Rights Act of 1964 and of the Griffin case, supra, and has so limited the aid it will grant. See Resolution in the appendix. But the Attorney General of the United States and the District Court are not satisfied with that limitation and, in effect, say that *any* state aid to any student who attends a private school that has not integrated is unconstitutional.

The District Court apparently recognizes that such a ruling cannot be justified in whole, hence its approval of state aid to students attending segregated private schools if limited to free school books and lunches because it says:

> "The free lunches and textbooks Louisiana provides for all its school children are the fruits of racially neutral benevolence. Tuition grants are not the products of such a policy."

Purpose is frequently confused with motive. The first Mr. Justice Harlan put this clearly in his opinion in *People v. Roberts*, 171 U.S. 658. While this was a dissenting opinion, his views on that point, as on many others, have become the law. The majority in deciding a corporation tax case had sustained a greater tax burden on a foreign corporation manufacturing elsewhere than would have been imposed if the company's manufacturing plant had been in New York. The majority held that if favoring the local manufacturer had been the object of the law it would have been unconstitutional as "tending to affect or regulate commerce between the states. But we think that obviously such is not the purpose of this legislation." Justice Harlan, dissenting, said: "In a legal sense the object or purpose of legislation is to be determined by its natural and reasonable effect whatever may have been the motives of the legislature" adding that constitutionality is not to be determined by purpose "if by 'object' or 'purpose' is meant the motive which controlled members of the state legislature when they enacted such legislation." 171 U.S. 658.

Motive was used as a test in *Hammer v. Dagenhart*, 247 U.S. 251, (1918) but in *United States v. Darby*, 312 U.S. 100, (1941) concerning the Fair Labor Standards Act, Justice, later Chief Justice Stone, rejected the reasoning of *Hammer v. Dagenhart*. Shortly afterwards, in *Daniel v. Family Security Life Ins. Co.*, 336 U.S. 220, 224, (1949), Justice Murphy

speaking for a unanimous Court said "[w]e cannot undertake a search for motive in testing constitutionality."

The distinction thus marked by this Court has been well understood. There are many citations which might be given. We choose a few. In *Hudson v. The American Oil Company*, 152 F.Supp. 757, 770, (E.D. Va. 1957) the Court said, "Motive is that which prompts the choice or moves the will, thereby inciting or inducing action, while 'purpose' is that which one sets before himself as the end, aim, effect or result to be kept in view or object to be attained."

In *Shuttlesworth v. Birmingham Board of Education of Jefferson County Alabama*, 162 F.Supp. 372, 381, (N.D. Ala. 1951) Judge Rives, Circuit Judge, speaking for the Court constituted under 28 U.S.C. 2281, upheld the constitutionality of a student-placement law, saying:

> *"In testing constitutionality 'we cannot undertake a search for motive.' 'If the State has the power to do an act, its intention or the reason by which it is influenced in doing it cannot be inquired into.' Doyle v. Continental Insurance Co., 94 U. S. 535, 541, 24 L.Ed. 148. As there is no one corporate mind of the legislature, there is in reality no single motive. Motives vary from one individual member of the legislature to another."*

This Court affirmed, thus:

> "The motion to affirm is granted and the judgment is affirmed upon the limited grounds on which the district court rested its decision. 162 F.Supp. 372, 384." 358 U.S. 101.

In the even more recent case of *United States v. Miller*, 367 F.2d 72, 76, (2nd Cir. 1966) cert. denied Feb. 13, 1967, in-

volving the military draft laws, the Second Circuit Court again announced the rule we assert:

> "Appellant contends that the 1965 amendment is unconstitutional (1) on its face, because it's legislative history establishes that it was enacted deliberately to suppress dissent; (2) as applied to the facts of this case, because the conduct it punishes this defendant for is symbolic speech protected by the First Amendment; and (3) under the Fifth Amendment because it serves no rational legislative purpose.
>
> "As to the first contention, going behind the terms of a statute to divine the collective legislative motive for its enactment is rarely, if ever, done by a court. Thus, in *Sonzinsky v. United States*, 300 U.S. 506, 513-514, 57 S.Ct. 554, 556, 81 L.Ed. 772 (1937), the Supreme Court stated that '[i]nquiry into the hidden motives which may move Congress to exercise a power constitutionally conferred upon it is beyond the competency of Court.'"

While the Court was there dealing with an Act of Congress, it cited the *Daniel* case, supra, which dealt with a state statute as one of the several authorities for the rule; and we believe the same rule which applies to consideration of an Act of Congress must be applied to consideration of a state statute.

We are not unmindful of *Gomillion v. Lightfoot*, 364 U.S. 339, 345, (1960) which involved state gerrymandering of legislative districts which the plaintiffs claimed would "deny them the right to vote in defiance of the Fifteenth Amendment." The *result* of that Alabama Act, *not* the motives of the legislators who enacted it, was at stake. The plaintiffs were residents of Tuskegee and had the right to vote there. The legislation would have deprived them of that right.

The Court reasoned that the authority of states to reorganize cities is not absolute, referred to decisions protecting contractural rights in such instances and added:

> "If all this is so in regard to the constitutional protection of contracts, it should be equally true that, to paraphrase, such power, extensive though it is, is met and overcome by the Fifteenth Amendment to the Constitution of the United States, which forbids a state from passing any law which deprives a citizen of his vote because of his race." 364 U.S. 334, 345.

The Fifteenth Amendment is unique. Deprivation of the right to vote does not violate it. It is only when the right is denied or abridged by the United States or by any state *"on account of race, color, or previous condition of servitude"* that the amendment is violated. Even under the unique language of the Fifteenth Amendment, *the purpose or necessary effect* of the law, not the motives of the legislature, was the subject of inquiry and as in all such cases, it is what the law requires which determines its constitutionality or unconstitutionality per se.

In the voter qualification case *United States v. State of Louisiana*, 225 F. Supp. 353 (1963), the Court had to deal with the so called "interpretation" section of the Louisiana Constitution. The principle now discussed was recognized thus:

> "In going beyond the verbal surface of the Louisiana interpretation test, we have sought to eschew inquiry into motive. A federal court's proper respect for the State and the judiciary's due regard for the legislative process, among other reasons, compel this restraint." 225 F.Supp. 353, 361.

In that case, the Court was again dealing with the Fifteenth Amendment and its controlling phrase "on account of

race," of course, had to be dealt with. The Court cited *Gomillion*, supra, which dealt with the same problem and said "[t]he legislative purpose and *inevitable* effect of a law non-discriminatory on its fact may be decisive in determining the constitutionality of the law." 225 F.Supp. 353, 362.

In our view, the "interpretation" clause might well have been declared unconstitutional on its face, for it confided to a registrar of voters solely determination of what clause of the constitution must be interpreted by the prospective voter and whether the interpretation given was reasonable. So subjective a test could never be valid in a system of government by law; and, if the government were wholly dictatorial and arbitrary, there woull be no need to make pretense with any test. Moreover, all of the series of laws on the subject had the same effect—namely, to deprive Negroes of their vote. Even the original "grandfather" clause was to let the illiterate white man vote while preventing the illiterate Negro from doing so.

In *Brown*, supra, laws which *required* segregated schools for Negro children and white children were declared unconstitutional, but *not* on account of the motives which may have led to their enactment. The conclusion of the Court is not left in doubt. It stated:

> "We conclude that in the field of public education the doctrine of 'separate but equal' has no place. Separate educational facilities are inherently unequal. Therefore, we hold that the plaintiffs and other similarly situated for whom the actions have been brought are, by reason of the segregation complained of, deprived of the equal protection of the laws guaranteed by the Fourteenth Amendment." 347 U.S. 483, 495.

Thus the question was and always should be what the

law itself requires, not the motives which led the lawmakers to put it on the books.

It is not disputed that many more white children are receiving grants than are Negro children, but this is only because the parents of Negro children have not sought the grants in as great numbers. None have been turned away, and it is a serious thing to the nation to test the constitutionality of statutes by the numbers of people of the different races who seek its benefits.

In *United States v. Jefferson County Board of Education, et al.*, 372 F.2d 836 (1966); 380 F.2d 385 (1967) (Cert. Denied by this Court in October 1967), the Fifth Circuit itself recognized with respect to the public schools that relatively few Negro children were attending schools formerly attended only by white children in Louisiana and dealt at length with integration but in its decree recognized that short of complete regimentation the Court must depend upon a free exercise of choice by children or their parents. What else could be done other than to enforce some sort of a quota system irrespective of the wishes of the children or their parents and irrespective of cost! However wise a quota plan might be, little would remain of freedom or liberty. We call to the Court's attention *Clark v. The Board of Education of the Little Rock District*, 369 F.2d 661, 666 (December 15, 1966) in which it was said:

> "Plaintiffs are disturbed because only 621 of 7,341 Negroes in the Little Rock school system of 23,003 (as of 1965) were actually attending previously all white schools. Thus, they argue that the 'freedom of choice' plan is not succeeding in the integration of the schools.
>
> * * *
>
> "We find no unlawful discrimination in the giving of students a free choice of schools. The system is

> not subject to constitutional objections simply because large segments of whites and Negroes choose to continue attending their familiar schools. It is true that statistics on actual integration may tend to prove that an otherwise constitutional system is not being constitutionally operated. However, these statistics certainly do not conclusively prove the unconstitutionality of the system itself.
>
> * * *
>
> "In short, the Constitution does not require a school system to force a mixing of the races in school according to some predetermined mathematical formula. Therefore, the mere presence of statistics indicating absence of total integration does not render an otherwise proper plan unconstitutional."

In *Griffin v. Board of Supervisors*, supra, the District Court for the Eastern District of Virginia was confronted with the averment that the Negro had no private schools to go to and was thus denied equal protection of the law. The Court said that if correct the argument related to an economic, not a constitutional obstruction.

Moreover in the *Jefferson County* case, supra, the Court noted that one of the problems is that "[m]any Negro children, for various reasons, prefer to finish school where they started." Of course, neighborhood problems continue to influence the composition of particular schools, and federal courts elsewhere have concluded that school boards are not required to move the children about in busses to break that situation. 372 F.2d. 836, 849.

Matters In Which It Is Contended That The Court Abused Its Discretion By Granting The Injunction Sought (Rule 15 1(g)

The stated purpose of the Act is legal. Its effect is to give tuition grants to Negro children as well as to white children

who attend private schools. The State does not operate or control these schools and does not require segregation by them. The Act makes tuition grants available to children attending integrated non-sectarian private schools. The Newman High School has announced an open-door policy and grants will be made available to students attending the famous New Orleans school. The constitutionality of this statute is not to be tested by the numbers of the different races making use of it. Nevertheless, the Court declared the Act null on the basis of previous Louisiana history and newspaper quotations of particular legislators. Both approaches are erroneous.

A. History

The Court said:

> "As certainly as '12' is the next number of a series starting 2, 4, 6, 8, 10, Act 147 fitted into the long series of statutes the Louisiana legislature enacted for over a hundred years to maintain segregated schools for white children. * * *"

It is as though the Court itself were embattled against the Legislature and emphasizes the importance of Cooley's observation:

> "The validity of legislation can never be made to depend on the motives which have secured its adoption, whether these be public or personal, honest or corrupt.
>
> * * *
>
> "[T]o make legislation depend upon motives would render all statute law uncertain, and the rule which should allow it could not logically stop short of permitting a similar inquiry into the motives of those who passed judgment."

Of course, "12" is the next number of a series starting 2, 4, 6, 8, 10 and, of course, the government of Louisiana was opposed to the *Brown* decision and had passed earlier statutes

declared illegal by the Court, but that does not mean that Louisiana is in defiance of the Court.

Louisiana's governors have never stood at schoolhouse doors to bar children nor have they called upon troops or police to do so. Disturbances in New Orleans which occurred during the first integration were handled by local and state authorities in the preservation of peace and good order. These comments are not intended to deny that there was much dismay in Louisiana with respect to the *Brown* decision. Nor do we deny that the 1958 version of a tuition grant statute was related explicitly to race and triggered by actions concerning race. Nor do we dispute that the 1960 version was tied into the "interposition" package of acts.

However, the Act now under consideration is not related to race, and action under it is not triggered by race. There is no massive resistance in Louisiana. Public schools are open, and if the integration in some communities is light in numbers, in New Orleans where the plaintiffs in this suit reside, there are 29 integrated public schools attended by 10,000 white children and 6,000 Negro children. The famous Newman High School of New Orleans has announced an open-door policy and grants will be made to students who attend it without regard to their race or color.

If we resort to history, all of us know without documentation that all over the United States there has been discrimination against Negroes in the past; that Negroes originally came to this country as slaves; the Constitution itself recognized that status in determining the representation in Congress[1] and by providing that after 1808[2] no slaves could be brought into the United States. The Missouri Compromise of

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1. Art. I Sec. 2. United States Constitution.
2. Art. I Sec. 9. United States Constitution.

1850, the *Dred Scott*[3] decision nullifying it, the gradual abolition of slavery throughout the northern part of the United States, the gradual desegregation of public schools throughout the northern part of the United States, which in many instances came long after the Civil War[4] and the Thirteenth, Fourteenth, and Fifteenth Amendments demonstrate an evolution of the law not only in Louisiana but throughout this nation. To ask this Court to declare a state law unconstitutional because of remote or recent history though neither its terms nor its administration invoke a color line is surely not justified.

The result of such an argument is to say that Act 47 of 1962 if enacted by any but Virginia, North Carolina, South Carolina, Georgia, Florida, Alabama, Mississippi, Louisiana, Texas, Arkansas—and perhaps Tennessee and Kentucky—or maybe even Maryland—would be legal, but not in these states. This is indeed to treat the southern states as if they were somewhat less than full members of the Union despite all they and their people have done to make this Union even greater since 1865. This is not contradicted by *Reitman v. Mulkey*, 387 U.S. —— (May 29, 1967); for in California the state constitutional amendment under consideration could have no other effect than to nullify laws which themselves had abrogated any color lines as to residences. Even so, Your Honors were closely divided on the point.

B. NEWSPAPER ARTICLES AS EVIDENCE

The Court permitted the Department of Justice to introduce a large number of copies of newspaper articles allegedly containing statements of members of the Louisiana Legisla-

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3. *Scott v. Sandford*, 19 Howard 343.

4. For example, Feb. 22, 1887 in Ohio as noted in *Deal et al v. The Cincinnati Board of Education*, 369 F.2d. 55.

ture during the period Act 147 of 1962 was being considered. Counsel for the Louisiana Financial Assistance Commission and its officers and members objected to the introduction of such evidence not only because it related to motives of particular persons but also on the basis that it was objectional under the well-known hearsay rule. The Court ruled that the newspaper articles would be admitted subject to counsel's objections and that a ruling would be made on this point in the opinion on the merits. Although the lower Court made extensive use of these newspaper articles in its final opinion, no ruling on counsel's objection was made.

The earliest permissible use of writings without the appearance of the author as an exception to the heresay rule is found in *Morris v. Harmer's Heirs' Lessee*, 7 Pet. 553 (1833). At page 558, Justice Story speaking for the Court stated:

> "All evidence of this sort must be considered as mere hearsay; and certainly, as hearsay, it is of no very satisfactory character. *Historical facts*, of general and public notoriety, may indeed be proved by reputation; and that reputation may be established by historical works of known character and accuracy. But evidence of this sort is *confined in a great measure to ancient facts, which do not presuppose better evidence in existence*; and where, from the nature of the transactions, or the remoteness of the period, or the public and general reception of the facts, a just foundation is laid for general confidence. See 1 Starkie's Evid. pl. 1, sec. 50 to 44, p. 60 to 64; 1 Starkie's Evid. pl. 2, sec. 55, pp. 180, 181. But the work of a living author, who is within the reach of process of the court, can hardly be deemed of this nature. He may be called as a witness. He may be examined as to the sources and accuracy of his information; and especially if the facts which he relates are of a recent date, and may be fairly presumed to be within the knowledge of many living persons, from whom

> he has derived his materials; there would seem to be cogent reasons to say that his bok was not, under such circumstances, the best evidence within the reach of the parties."

Subsequently in *Dallas County v. Commercial Union Assurance Co.*, 286 F. 2d. 388 (5th Cir. 1961) the Court permitted the introduction into evidence of a 58-year old newspaper account of a fire in the tower of a courthouse to show that char was the result of an old fire rather than recent lightening. Not until *Hall v. St. Helena Parish School Board*, 197 F. Supp. 649 (Ed. La. 1961), affirmed 1961, 368 U. S. 515, do we find the use of newspaper articles to prove a fact of current happening. It should be noted that the newspaper articles were admitted in the *Hall* case without objection from opposing counsel. Significantly, the opinion cites no authority for their use as evidence. In *United States v. Louisiana*, 225 F. Supp. 353 (1963) we again find the Court permitted the introduction of 42-year old newspaper accounts of the proceedings of the 1921 Louisiana Constitutional Convention. The *Hall* case stands out as the only example of the use of current newspaper articles to prove facts at issue. None of the scholarly reasons enumerated in the *Dallas County* case were applicable to the *Hall* case nor are they applicable to the case before this Court. The legislators and the newspaper reporters were not shown to be unavailable. Thus, the newspaper articles were improperly admitted.

C. LACK OF STANDING

The complainants say that public funds should not be used to aid private schools indirectly by tuition grants to their students. They say that the public school system is thus deprived of full support and that this is an illegal use of public funds. The facts are that the funds used for tuition grants are different from those used for public education, that funds

for public education have not been diminished and in fact had been relatively enhanced by serving a somewhat lesser number of students and by private capital being used for capital investments in private schools. Moreover, by consent it was stipulated in the record that the Governor of Louisiana would testify that Louisiana does not propose to substitute a tuition grant program for its public school system. In any event, the right to question the use of state funds is not a right granted by the United States Constitution. This Court denied such a right in *Commonwealth of Massachusetts v. Mellon*; *Frothingham v. Mellon*, 262 U.S. 447. While Your Honors have recently decided to review a case involving that principle, this is the state of the law now. Louisiana permits a taxpayer to question public expenditures but no one can do so without alleging his status as a taxpayer which these complainants have not done. They no doubt have standing to insist that there be no segregation on the basis of race or in the schools named in their complaint if those schools are truly public schools because of state action to a prohibited degree, but the federal constitution does not confer upon them standing to question the use of state funds.

D. MISTAKE OF REMEDY

The form of relief sought in this action is borrowed from *Griffin v. County School Board of Prince Edward County*, 377 U.S. 218 (1964). The remedy there was deemed appropriate as a means of forcing the County to reopen public schools which the County had closed despite Court orders, and even when ordered to provide funds for public schools had provided too little for the purpose. The Court's language on this point is succinct:

> "The injunction against paying tuition grants and giving tax credits while public schools remain closed

> is appropriate and necessary since those grants and tax credits have been essential parts of the county's program, successful thus far, to deprive petitioners of the same advantages of a public school education enjoyed by children in every other part of Virginia." 377 U.S. 218, 233.

Not the right to control use of state funds but the right to force the reopening of public schools was the purpose of the injunction in the Prince Edwards case. Here, in Louisiana, the public schools are open and are well supported by Louisiana. Many are integrated and a substantial number have large numbers of children of both races. Tuition grants are available to both races and no application by Negro parents has been rejected. Whatever right the complainants may have to attend the schools under private control, enjoining the state from granting tuitions is not an appropriate action in this case.

F. THE DECISION IN THE PRESENT CASE PREVENTS UNIFORMITY OF TREATMENT OF THIS NATION WIDE PROBLEM WHICH THE CONGRESS BY THE CIVIL RIGHTS ACT OF 1964 INTENDED

No one can gainsay that some state action is involved with respect to private schools in Louisiana. Free textbooks are furnished. The textbooks are related to the courses studied, but there is not a transfer of teachers and students from public schools to private schools en masse as it occurred in Prince Edward's County. The school teachers are not recruited from the public schools. Many come from parochial schools or have retired from the public schools or are only now entering the teaching profession in Louisiana. Free transportation is not provided. Free lunches are not provided. Public buildings are not provided for the owner of the private schools whether operated for profit or on a non-profit basis furnish their own facilities. It has not thus far been held that any

state action at all with respect to a private non-integrated school is repugnant to the 14th amendment to the United States constitution. The United States District Court for the eastern district of Virginia in the 1965 Griffin case held that state action stops with the grant of tuition to the student or his parent, and is not per se such control as to make the conduct of the school state action. *Dartmouth College v. Woodward,* 17 U.S. (4 Wheat) 518 (1819) and *Guillory v. Administrators of Tulane University,* 212 F.Supp. 674 (E.D. of La. 1961).

The Court in the 1965 Griffin case, supra, held:

> "Payment of a tuition grant for use in a private school is legal if it does not tend in a determinative degree to perpetuate segregation. The test is not the policy of the school, but the measure in which the grant or grants contribute to effect the exclusion on account of race. Every exclusive school is not a forbidden school. The part played by the grant in effectuating the exclusion, to repeat, is the pivotal point. It is decisive because the extent of such participation determines whether or not the exclusion is State action—the fundamental question here." 239 F.Supp. 560, 565.
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> "Private schools are in no wise outlawed by our decision. They have existed for centuries undominated by the State support, and no reason appears why they cannot still flourish without it. Furthermore, as we have already indicated, State grants may within certain limits still be paid for use in private schools although they adhere to a policy of segregation. *Our determination is simply that the preponderant support of a segregated school may not be rooted in State action.*" 239 F.Supp. 560, 566.

In the *Tulane* case, supra, on rehearing the Court noted the undoubted relation of Tulane to the State through the

Tulane Educational Fund by Act 43 of 1884 and by way of tax exemption. The Court said:

> "The question is fundamentally a federal constitutional one, i. e. must the body which operates the Tulane University of Louisiana respond to the constitutional demands of equality of treatment to the citizens of this StSate, nothing more and nothing less. 212 F.Supp. 674, 681.
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> ". . . The law is clear that purely private organizations performing purely private activities may freely associate themselves with a State in such a way as to make that private organization, in its private activity, subject to the Fourteenth Amendment, whether that activity be that of a restaurant, *Burton v. Wilmington Parking Authority*, 365 U.S. 715, 81 S.Ct. 856, 6 L.Ed.2d 45; a golf course, *Hampton v. City of Jacksonville*, 5 Cir., 304 F.2d. 320; a library, *Kerr v. Enoch Pratt Free Library*, 4 Cir., 149 F.2d 212, or in this case a university. With few isolated exceptions, (*Terry v. Adams*, 345 U.S. 461, 73 S. Ct. 809, 97 L.Ed. 1152; *Marsh v. Alabama*, 326 U.S. 501, 66 S.Ct. 276, 90 L.Ed. 265), activities are in themselves neither public nor private. What gives them their constitutional character *is their source of power and control.* This may be solely private, see *Hampton v. City of Jacksonville*, 5 Cir., supra, at 322, of 304 F.2d; *Tonkins v. City of Greensboro*, 4 Cir., 276 F.2d 890, or solely state, *Brown v. Board of Education, supra*, or both private and state, *Burton v. Wilmington Parking Authority, supra.* It is, of course, significant that education, as an activity, when engaged in by a private institution has long been held to be fundamentally private. *Dartmouth College v. Woodward, supra.*" 212 F.Supp. 674, 682, 683.
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> ". . . The cases on state action suggest principles

not rules. Yet this court knows that 'only such action as may *fairly* be said to be that of the State,' *Shelley v. Kraemer,* 334 U.S. 1, 13, 68 S.Ct. 836, 842, 92 L.Ed. 1161 is under the aegis of the Fourteenth Amendment." 212 F.Supp. 674, 683.

* * *

". . . If the flow of state funds to private individuals is state action per se, then in these times the principle of the Civil Rights Cases recently approved and reaffirmed by the Supreme Court in *Burton v. Wilmington Parking Authority* and *Shelley v. Kraemer, supra,* is non-existent. But the recent affirmation of that principle convinces this court that much more than state funds in private hands is necessary for state action.

* * *

". . . Admittedly, when the state is by far the major contributor to the private enterprise, there is state action per se, *Kerr v. Enoch Pratt Free Library of Baltimore,* 4 Cir., 149 F.2d 212." 212 F.Supp. 674, 684.

* * *

None of this seems to us to be altered by the *Lee* decision (*Lee, et al. v. Macon County Board of Education, et al.,* Civil Action No. 604-E, U.S.D.C. Middle District of Alabama.) Again that decision is reached in the light of open opposition of the Governor to the enforcement of desegregation decrees of the Court which led the Court to a conclusion that the Alabama tuition grant law was nothing more than a sham. The Court noted that the defendant state officials had used their power to maintain racially segregated schools—including the power to punish. That case relates to the principles of *Yick Wo v. Hopkins,* 118 U.S. 356, (1886) concerning discriminatory use of a law, not its constitutionality per se, and the *Griffin* case of 1965 is not even mentioned—nor for that matter is *Hawkins vs. North Carolina State Board of Education, et al,*

(W.D. N.C. 2057)—Race Relations Law Reporter 745. To say that there is no rational basis on which to explain the Alabama statute may be valid. The Louisiana statute does not "narrow its focus on an extremely limited class of students—those students whose physical or emotional health would be adversely affected or whose safety might be jeopardized by attending public schools." Such a subjective test invites criticism as did the "interpretation" test in *U. S. v. Louisiana, supra.* On that basis the Court said the Alabama statute is unconstitutional.

In the 1965 *Griffin* case, where, under the Virginia law as under the Louisiana law, no color line is drawn for tuition grants, the Court said:

> ". . . save where the plan is subverted, after the grant has been released, the touch of the State with the child's education in the private school ends. Under the permissible administration of the plan, the mere acceptance of the money by the institution does not transform it into a Virginia instrumentality. 239 F.Supp. 560, 563.
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> * * *
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> "Absence of equal protection of the laws is asserted in the contention that there is inequality of enjoyment of the grants. This contention—which is also pressed to destroy the 'freedom of choice' label of the plan—is based on the averment that the Negro has no private school available to him for use of the tuition. The answer is at least two-fold. Initially, there is no proof that private schools are not at hand where the Negro may use the money. Next, such a result would not be the fault of the law; it is an economic, not a constitutional obstruction.
>
> "Over-all, the ultimate and inescapable upshot of the planitiffs' argument is that the State may not provide education except in schools where segregation is

proscribed by law or school policy. Not in logic or in precedent do we find the position upheld. Neither *Griffin v. School Board, supra,* 377 U.S. 218, 84 S.Ct. 126, 12 L.Ed. 2d. 256, nor *Griffin et al. v. Board of Supervisors,* 339 F. 2d. 486 (4 Cir. 1964) points that way. Decision in each instance was strictly confined to the circumstances peculiar to Prince Edward County and Surry County. Quite clearly, the Courts ventured no expression upon the universal validity of the Virginia tuition law." 239 F.Supp. 560, 564.

The Louisiana statute shows greater distance from state action, with respect to private schools, tha ndoes the Virginia statute. For in Virginia, the State Board of Education regulates the application of the grant-in-aid and the teachers in schools whose pupils receive grants are covered by the state pension plan for all teachers. Not so in Louisiana.

The distinction between a valid state law, such as ours, and an invalid one is pointed out clearly in *Hawkins.* The Court of three judges said:

". . . The case of *Griffin v. State Board,* 239 F. Supp. 560 (1965), is not apposite *for there the tuition grants were available to anyone without distinction as to reason for not wanting to attend a public school.*

* * *

"The Virginia three-judge district court stated: 'Obpiously, no distinction in eligibility is here made on account of race.' Id. at 563. Under the North Carolina statute a determination of race must be made, a student is not eligible unless a child of another race attends his assigned school *and* there is no other convenient segregated school for him to attend. §115-275. This is *contrasted* to the Virginia legislation where a student *could* receive the same grant even if he were assigned to a *segregated* public school initially."

Your Honors will observe, as did the Virginia Court in the 1965 Griffin case, that its ruling is in harmony with the Congressional definition of a public school in the Civil Rights Act of 1964 which is as follows:

> "(c) 'Public school' means any elementary or secondary educational institution, and 'public college' means any institution of higher education or any technical or vocational school above the secondary school level, provided that such public school or public college is operated by a State, subdivision of a State, or governmental agency within a State, or operated wholly or *predominantly* from or through the use of governmental funds or property, or funds or property derived from any governmental source." §401(c), 42 USCA §2000c(c).

"Predominant" means having ascendancy over others; superior, as in strength. (Webster). We have not found that any other meaning was given to the words by Congress.

Congress enacted this law for all of the United States. This represents the thought of the legislative branch of our government after consideration of all related problems and interests and not just the views of particular litigants. As it is designed for nationwide use it should be applied as written. In the interest of good order, different rules and different formulas should not be sought in the many cases presented to this Court.

This Court acted on general principles in *Brown* to forbid state enforced segregation. The Court did not command state enforced integration. Especially did the Court not consider the extent of state action which would require integration. *Congress has done so.* Predominant support has been made the test. This Court has consistently made it clear that where Congress acts within its authority this Court will not

substitute its judgment for that of the legislature. Your predecessors have said:

> "It is not the function of a court to determine whether the public policy that finds expression in Legislation of this order is well conceived * * *. Within the field where men may reasonably differ, the Legislature must have its way." *Williams v. Mayor and City Council of Baltimore*, 289 U.S. 36, 42.

The rule is even stronger when the Congress is concerned. The injunction granted is not consistent with the public policy stated by Congress. We believe the District Court for the Eastern District of Louisiana erred in rejecting the Congressional view and the view of the United States District Court for the Eastern District of Virginia and the Western District of North Carolina.

CONCLUSION

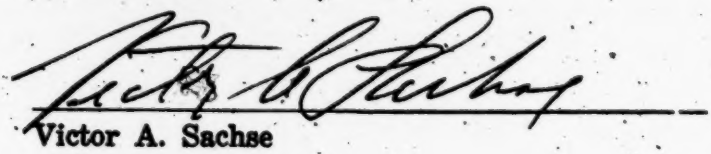
It is respectfully submitted that this Court has jurisdiction of this appeal under Sec. 1253, Title 28, United States Code; that the questions presented are so substantial as to require plenary consideration under Rule 15, 1(f) of the rules of this Court; and that the Court below abused its discretion by granting the injunction sought by complainants.

Respectfully submitted,

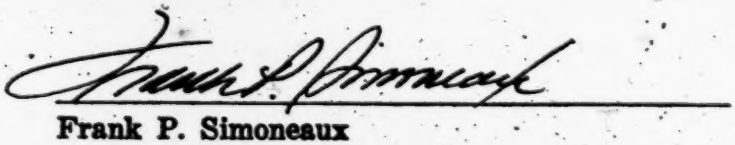
J. J. Davidson, Jr.

Sidney W. Provensal, Jr.

C. C. Wood



Victor A. Sachse



Frank P. Simoneaux

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CERTIFICATE OF SERVICE

I, Victor A. Sachse, one of the Attorneys for the Louisiana Financial Assistance Commission, its officers and members, appellants, herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that, on the 3rd day of November, 1967, I served copies of the foregoing Jurisdictional Statement to the Supreme Court of the United States on the several parties thereto; as follows:

1) On Bryan Poindexter, a minor, by Lorraine Poindexter, his mother and next friend; Alfred Louis Larks, a minor, by Charles Larks and Cora Lee Larks, his parents and next friends; Anthony Jarrow, a minor, by Peter Jarrow and Ruby Jarrow, his parents and next friends; on behalf of themselves and other Negro Children and their parents similarly situated, by air-mailing a copy thereof to A. P. Tureaud and A. M. Trudeau, Esqs., 1821 Orleans Avenue, New Orleans, Louisiana, 70116 and Jack Greenberg, Charles H. Jones, Jr., and Henry Aaronson, Esqs., 10 Columbus Circle, New York, New York.

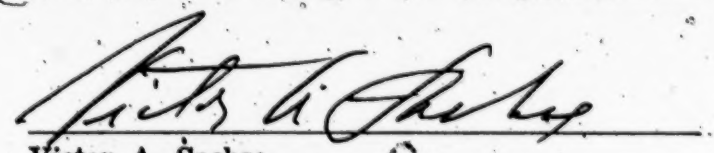
2) On the United States, a plaintiff-intervenor, by air mailing copies thereof to Louis Lacour, Esq., United States Attorney for the Eastern District of Louisiana, at 400 Royal Street, New Orleans, Louisiana, Hugh W. Fleischer, Esq., United States Department of Justice, 1723 Masonic Building, New Orleans, Louisiana and the Solicitor General, Department of Justice, Washington 25, D. C.

3) On Mrs. Thelma Deamer, Carroll Leach, Rosetta Jiles and Mrs. Fannie Magee, defendant-intervenors, by air mailing copies thereof to Cy Courtney, Esq., National Bank of Commerce Building, New Orleans, Louisiana 70112, and Richard Cadwallader, Esq., Louisiana National Bank Building, Baton Rouge, Louisiana.

4) On Garden District Academy, defendants, by air mailing copies thereof to Sydney J. Parlongue, Esq., National Bank of Commerce Building, New Orleans, Louisiana 70112.

5) On Ninth Ward Elementary School and Armond J. Duvio, and Carrollton Elementary School Association, defendants, by air mailing copies thereof to Walter E. Doone, Esq., Room 205, Southern Marine and Aviation Building, New Orleans, Louisiana 70112.

6) On Louisiana State Board of Educaaion, defendant, by mailing copies thereof to Frank L. Dobson, Esq., Attorney General's Office, Capitol Building, Baton Rouge, Louisiana.



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